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The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law

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The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law

GREGORY S. GORDON*

Among international jurists, the conventional wisdom is that atrocity speech law sprang fully formed from two judgments issued by the International Military Tribunal at Nuremberg (IMT): the crimes against humanity conviction of Nazi newspaper editor Julius Streicher, and the acquittal on the same charge of Third Reich Radio Division Chief Hans Fritzsche. But the exclusive focus on the IMT judgments as the founding texts of atrocity speech law is misplaced. Not long after Streicher and Fritzsche, and in the same courtroom, the United States Nuremberg Military Tribunal (NMT) in the Ministries Case, issued an equally significant crimes against humanity judgment against Reich Press Chief Otto Dietrich, who was convicted despite the fact that the charged language did not directly call for violence. So why is the Dietrich judgment, a relatively obscure holding, issued sixty-five years ago, so significant today, after the development of a substantial body of ad hoc tribunal jurisprudence on atrocity speech? It is because the seemingly antithetical holdings in Streicher and Fritzsche are more than just the subject of academic discourse. The next generation of atrocity speech decisions, it turns out, is at loggerheads about the relationship between hate speech and persecution as a crime against humanity. Trial chambers for the International Criminal Tribunal for Rwanda (ICTR) have found that hate speech, standing alone, can be the basis for charges of crimes against humanity (persecution). A trial chamber for the International Criminal Tribunal for the former Yugoslavia has reached the opposite conclusion. And surprisingly, these judicial decisions, like the academic commentary, have completely ignored the Dietrich judgment. This Article fills in this significant gap in the judicial and academic literature by historically situating Dietrich, elucidating its holding and relationship to the IMT and ad hoc tribunal decisions, explaining its significance for current and future hate speech cases (including those in Kenya, Burma and Sudan) and offering an explanation for why it has lain in obscurity for over six decades. The Article concludes that judicial reliance on the Dietrich judgment would extricate the law from the Streicher–Fritzsche jurisprudential gridlock and permit development of doctrine that is more coherent and human rights-oriented. It would also help illuminate an important but long overlooked chapter in legal history.

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TABLE OF CONTENTS

I. INTRODUCTION	573
II. THE NUREMBERG PROPAGANDA CASES.....	576
A. <i>Overview</i>	576
1. <i>Julius Streicher</i>	577
2. <i>Hans Fritzsche</i>	578
3. <i>Otto Dietrich</i>	579
a. <i>Background</i>	579
b. <i>Dietrich and the Press</i>	580
c. <i>Dietrich in the Nazi Power Hierarchy</i>	582
d. <i>Dietrich and the Persecution of the Jews</i>	582
e. <i>The Trial and Conviction of Otto Dietrich</i>	583
i. <i>Background</i>	583
ii. <i>The Indictment</i>	584
iii. <i>The Conviction</i>	585
iv. <i>A Finding of Persecution in the Judgment</i>	587
III. HATE SPEECH AND PERSECUTION IN THE MODERN CASES AND COMMENTARY	588
A. <i>Hate Speech and Persecution in the Rwandan Genocide Cases</i>	588
1. <i>Georges Ruggiu</i>	588
2. <i>The ICTR Media Case</i>	589
3. <i>The Mugesera Case</i>	590
B. <i>Hate Speech and Persecution at the ICTY</i>	591
C. <i>The Media Case Appeals Chamber Decision</i>	592
D. <i>Scholarly and Expert Commentary</i>	593
IV. THE SIGNIFICANCE OF THE <i>DIETRICH</i> CASE GOING FORWARD	595
A. <i>The Importance of Criminalizing Hate Speech Not Explicitly Calling for Violence for Persecution Offenses</i>	595
B. <i>Moving Beyond the Strict Confines of Incitement to Genocide</i>	596
C. <i>Specific Cases</i>	598
1. <i>The Case of Myanmar and the Muslims</i>	598
2. <i>The Case of Iran and the Israelis</i>	599
3. <i>Other Cases</i>	601
a. <i>Kenya</i>	601
b. <i>Côte d'Ivoire</i>	602
c. <i>Sudan</i>	603
V. CONCLUSION	605

I. INTRODUCTION

Among international jurists, the conventional wisdom is that atrocity speech law sprang fully formed from two judgments issued by the International Military Tribunal (IMT) at Nuremberg: those of Julius Streicher,¹ editor-in-chief of the virulently anti-Semitic newspaper *Der Stürmer*, and Hans Fritzsche,² Head of the Radio Division of the Third Reich's Propaganda Ministry.³ Streicher was convicted of persecution as a crime against humanity for his genocidal propaganda.⁴ Fritzsche was acquitted of the same charge.⁵ And so the two cases have often been cited to support antithetical positions among jurists and scholars—*Streicher* for the proposition that international criminal charges against propagandists are viable and can target a wide range of speech,⁶ *Fritzsche* to back the contention that such charges have their limits and must be directed at only a narrow category of expression.⁷ And even without

¹ See *The Nurnberg Trial*, 6 F.R.D. 69, 161–63 (Int'l Mil. Trib. 1946).

² See *id.* at 186–87.

³ See, e.g., *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 980–82 (Dec. 3, 2003), <http://www.refworld.org/pdfid/404468bc2.pdf> (beginning “review of international law and jurisprudence on incitement to discrimination and violence” with exclusive exposition of IMT *Streicher* and *Fritzsche* judgments); see also *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 19 (June 1, 2000), <http://www.unict.org/Portals/0/Case/English/Ruggiu/judgement/rug010600.pdf> (examining “significant legal precedents related to the crime of persecution” and then uniquely citing *Streicher*); *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 550 (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (citing *Streicher* as the “most famous conviction for incitement”).

⁴ *The Nurnberg Trial*, 6 F.R.D. at 161–63.

⁵ *Id.* at 186–87.

⁶ See, e.g., *Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 980–82 (finding that hate-speech radio broadcasts not necessarily calling for action blatantly deprived the target ethnic group of fundamental rights and thus, even without proof of causally related violence, could be the basis for charging persecution as a crime against humanity); *Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 21 (taking a similarly expansive view of hate speech and persecution); Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 886–90 (2008) (finding that Iran's president could be liable for persecution based on hate speech directed at Israel).

⁷ See, e.g., *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf (finding that the hate speech alleged in the indictment did not constitute persecution because it did not directly call for violence and thus failed to rise to the same level of gravity as the other enumerated CAH acts, such as murder and rape); Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 NEW ENG. INT'L & COMP. L. ANN. 17, 39–40 (2005) (suggesting that, in light of freedom of expression concerns, hate speech not directly calling for violence should not be the basis for crimes against humanity (persecution) charges).

Fritzsche, the *Streicher* judgment is somewhat equivocal in its holding.⁸ In particular, parts of it suggest that persecution can be proved by speech not amounting to direct calls for violence.⁹ Other portions suggest otherwise.¹⁰

But exclusive reference to the IMT judgments as the founding texts of atrocity speech law is misplaced. Not long after *Streicher* and *Fritzsche*, and in the same courtroom, the United States Nuremberg Military Tribunal (NMT) in the *Ministries Case*, issued an equally significant crimes against humanity judgment against a Nazi propaganda defendant—Reich Press Chief Otto Dietrich.¹¹ To the extent *Streicher* and *Fritzsche* arrived at different results, *Dietrich* broke the tie. For his inflammatory language in service of the Hitler regime, the NMT found the Press Chief guilty of persecution as a crime against humanity.¹² And it did so despite the fact that the language at issue in that case did not directly call for violence.¹³

So why is the *Dietrich* judgment, a relatively obscure holding, issued sixty-five years ago, so significant today, after the development of a substantial body of ad hoc tribunal jurisprudence on atrocity speech?¹⁴ It is because the seemingly antithetical holdings in *Streicher* and *Fritzsche* are more than just the subject of academic discourse. The next generation of atrocity speech decisions, it turns out, is at loggerheads about the relationship between hate speech and persecution as a crime against humanity.¹⁵ Trial chambers for the International Criminal Tribunal for Rwanda (ICTR) have found that hate speech, standing alone, can be the basis for crimes against humanity (persecution) charges.¹⁶ A trial chamber for the International Criminal Tribunal for the former Yugoslavia

⁸ See *infra* notes 28–38 and accompanying text.

⁹ See *infra* notes 28–38 and accompanying text.

¹⁰ See *infra* notes 28–38 and accompanying text.

¹¹ See United States v. von Weizsaecker (*Ministries Case*), Judgment, in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: “THE MINISTRIES CASE” 308, 575–76 (1949) [hereinafter 14 TRIALS OF WAR CRIMINALS: “THE MINISTRIES CASE”].

¹² See *id.*

¹³ See *id.*

¹⁴ See *supra* notes 6–7; see also Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment and Sentence, ¶ 142 (May 16, 2003), <http://www.unictr.org/Portals/0/Case/English/Niyitegeka/judgement/index.pdf> (incitement charge against Minister of Information of rump genocide regime); Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 44 (Sept. 4, 1998), <http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf> (incitement charge against Prime Minister of rump genocide regime).

¹⁵ Gregory S. Gordon, *Hate Speech and Persecution: A Contextual Approach*, 46 VAND. J. TRANSNAT’L L. 303, 305–06 (2013). This Article is a follow-up to *Hate Speech and Persecution*, which considered the *Dietrich* case more parenthetically. The analysis herein fleshes out that article’s collateral implications regarding *Dietrich* and provides an essential historical account of what ought to be a cornerstone judgment in the development of atrocity speech law.

¹⁶ See Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 980–82 (Dec. 3, 2003), <http://www.refworld.org/pdfid/404468bc2.pdf>; Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 19 (June 1, 2000), <http://www.unictr.org/Portals/0/Case/English/Ruggiu/judgement/rug010600.pdf>.

(ICTY) has reached the opposite conclusion.¹⁷ And an appeals chamber for the ICTR, which could have resolved the split between the two Tribunals, refused to do so.¹⁸

Surprisingly, these judicial decisions, like the academic commentary, have completely ignored the *Dietrich* judgment.¹⁹ This Article fills in the significant lacunae in the judicial and academic literature regarding *Dietrich* by elucidating its holding, showing its relationship to the IMT and ad hoc tribunal decisions, explaining its significance for future hate speech cases and offering an explanation for why it has lain in obscurity for over six decades. In the end, it concludes that the proper consideration of this overlooked decision could lend normative sanction to charging persecution for less direct forms of hate speech that nonetheless dehumanize the victim population, and condition the perpetrator population to commit mass atrocity—all in service of a widespread or systematic attack against a civilian population. In such situations, concerns about protecting free speech abate and the proper emphasis on protecting the persecuted holds sway.

The Article is divided into four sections. Part Two provides background regarding the Nuremberg Nazi propaganda defendants with a particular focus on Otto Dietrich. More specifically, it provides an overview of the *Ministries* trial proceedings against him and an analysis of the NMT's judgment. Despite some ambiguities in the record, it shows that Dietrich was convicted of persecution as a crime against humanity on the basis of his speech-related activity on behalf of the Third Reich. Part Three will examine the ad hoc tribunal cases regarding persecution as a crime against humanity, including the split between the ICTR and ICTY, the refusal of the ICTR Appeals Chamber to resolve the split, and the academic commentary surrounding the split. Finally, Part Four will explain *Dietrich's* significance in resolving the dispute. Given ongoing or recent instances of hate speech connected to atrocity in different parts of the world, including such places as Burma, Iran, Kenya, the Ivory Coast, and Sudan, the issue of whether hate speech standing alone may support a charge of persecution as a crime against humanity takes on significant relevance going forward.

Forums such as the International Criminal Court, dealing with both current and future cases, as well as domestic or ad hoc tribunals established to try recent and ongoing crimes, including those connected with the recent bloodshed in Egypt, may be called on to resolve the split between the ICTR and ICTY. And the judgment against Otto Dietrich may well resolve it in favor of finding that

¹⁷ See Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf.

¹⁸ Nahimana, Barayagwiza & Ngeze v. Prosecutor, Case No. ICTR 99-52-A, Judgment, ¶ 987 (Nov. 28, 2007), <http://www.refworld.org/pdfid/404468bc2.pdf>.

¹⁹ See Gordon, *supra* note 15, at 359 (referring to *Dietrich* and noting that "commentators and scholars have overlooked an extremely important piece of Nuremberg's jurisprudential mosaic").

hate speech not explicitly calling for action, and standing on its own, may be the basis of a charge of persecution as a crime against humanity.

II. THE NUREMBERG PROPAGANDA CASES

A. Overview

On achieving victory over Axis forces in World War II, the Allies established the International Military Tribunal at Nuremberg (IMT) to bring major Nazi perpetrators to justice.²⁰ Among the accused were two Third Reich media figures: Julius Streicher and Hans Fritzsche.²¹ The IMT convicted Streicher for crimes against humanity based on the virulently anti-Semitic pieces in his weekly tabloid, *Der Stürmer*, published from 1923 through 1945.²² Fritzsche was similarly charged owing to his work as head of the Radio Division of Nazi Germany's "Ministry of Public Enlightenment and Propaganda" (Propaganda Ministry).²³

Following the IMT proceeding, the United States instituted twelve trials of lower-ranking Nazi officials in the so-called subsequent Nuremberg proceedings, pursuant to Control Council Law Number 10.²⁴ The penultimate proceeding is referred to as the *Ministries Case*, which tried defendants in important posts in the Nazi ministries in the center of Berlin.²⁵ Among those defendants was the Propaganda Ministry's Press Chief, Otto Dietrich, whose job was to control the content of the Third Reich's newspapers and inform Adolf Hitler of newspaper content domestically and internationally.²⁶ Dietrich was convicted of crimes against humanity.²⁷

Each of these cases shall be considered in turn.

²⁰ Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter], reprinted in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 420-28 (1949).

²¹ J. Benton Heath, *Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law*, 44 GEO. WASH. INT'L L. REV. 317, 363 (2012).

²² See ANTONIO CASSESE, GUIDO ACQUAVIVA, MARY FAN & ALEX WHITING, INTERNATIONAL CRIMINAL LAW: CASES & COMMENTARY 156 (2011).

²³ MICHAEL G. KEARNEY, THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW 42 (2007).

²⁴ Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 859 n.198 (1990).

²⁵ LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 171-72 (2008).

²⁶ LYN GORMAN & DAVID MCLEAN, MEDIA AND SOCIETY INTO THE 21ST CENTURY: A HISTORICAL INTRODUCTION 93-94 (2d ed. 2009).

²⁷ Sarabeth A. Smith, Note, *What's Old Is New Again: Terrorism and the Growing Need To Revisit the Prohibition on Propaganda*, 37 SYRACUSE J. INT'L. L. & COM. 299, 319 (2010).

1. *Julius Streicher*

Julius Streicher was born on February 12, 1885, in the Upper Bavarian village of Fleinhausen.²⁸ He began his career as a teacher and then enlisted in the German Army during World War I. He served with distinction, earning, among other medals, the Iron Cross, First Class.²⁹ After World War I, Julius Streicher became the leader of the “German Socialist Party” and was initially a rival of Hitler.³⁰ But given their ideological affinities, they joined forces and Streicher became a loyal Hitler lieutenant. Streicher soon amassed much power, becoming, in rapid succession, a general in the SA Storm Troopers, the Gauleiter (district leader) of Franconia, and a member of the Reichstag.³¹ On his own initiative, he also founded a viciously anti-Jewish newspaper in 1923 called *Der Stürmer*.³² Read by 600,000 subscribers at its peak, this crude rag published a constant stream of hate screeds and grotesque caricatures meant to vilify and dehumanize Jews.³³ Displayed on public bulletin boards in glass-covered cases, the publication exerted a significant influence on German attitudes toward the Jewish community. As Nuremberg prosecutor Alexander Hardy noted:

The full force and effect of [Streicher’s] press propaganda on the masses is contained in an episode relating to the time when Streicher, as a Gauleiter, delivered a Christmas story to the children of Nuremberg. Reaching the climax of his Yuletide tale, which concerned a “little Aryan boy and girl,” Streicher suddenly asked the children, “do you know who the devil is?” And the little ones shrieked in chorus, “The Jew, the Jew.”³⁴

The IMT judgment against Streicher started with an observation regarding his anti-Semitic rhetoric and reputation: “For his twenty-five years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as ‘Jew-Baiter Number One.’”³⁵ The judgment reviewed a skein of pre- and post-war pieces Streicher penned himself calling for the annihilation, “root and branch,” of the Jewish people.³⁶ It wrote that “[i]n his speeches and articles week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution.”³⁷ The

²⁸ RANDALL L. BYTWERK, *JULIUS STREICHER: NAZI EDITOR OF THE NOTORIOUS ANTI-SEMITIC NEWSPAPER DER STÜRMER* 2 (2001).

²⁹ *Id.* at 5–6.

³⁰ ALEXANDER G. HARDY, *HITLER’S SECRET WEAPON: THE “MANAGED PRESS” AND PROPAGANDA MACHINE OF NAZI GERMANY* 82 (1967).

³¹ *Id.*

³² ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 503 (1984).

³³ HARDY, *supra* note 30, at 82.

³⁴ *Id.* at 83.

³⁵ *See, e.g.*, *The Nurnberg Trial*, 6 F.R.D. 69, 162 (Int’l Mil. Trib. 1946).

³⁶ *Id.* at 161–63.

³⁷ *Id.* at 162.

judgment further specified that Streicher wrote a good portion of these genocidal texts contemporaneous with Jews being liquidated in Eastern Europe. And Streicher, the Tribunal concluded, knew about Nazi atrocities to the east when he published these articles. The judgment concluded: "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the Charter, and constitutes a crime against humanity."³⁸

2. *Hans Fritzsche*

The son of a civil servant,³⁹ Hans Fritzsche was born in Bochum, in the Ruhr area of the western part of Germany, in 1900.⁴⁰ After serving as a private in the infantry of the German Army at the end of World War I, Fritzsche studied modern languages, history and philosophy at Griefswald and Berlin without passing his examinations.⁴¹ From there he transitioned into journalism, working as a correspondent for the *Hamburg Press*⁴² and as an editor for the *Telegraphen Union* news agency and the International News Service. He then gained expertise in a new medium, radio, ultimately becoming the head of the *Drahtloser Dienst* (Wireless News Service) in 1932.⁴³

In May 1933, Fritzsche joined the staff of the Nazi Propaganda Ministry and by 1938 had risen to the level of Chief of the German Press Division.⁴⁴ In this capacity, he issued Nazi propaganda "press directives" to newspaper editors on a daily basis.⁴⁵ These were essentially orders issued at a daily press conference for what the press should publish.⁴⁶ The IMT described these as "instructions [directing] the press to present to the people certain themes, such as the leadership principle, the Jewish problem, the problem of living space, or other standard Nazi ideas."⁴⁷ In 1942, Fritzsche became head of the Radio Division of the Propaganda Ministry and hosted a daily radio program "*Hans Fritzsche Speaks*."⁴⁸

These broadcasts were the basis of the crimes against humanity charges against Fritzsche. The evidence presented against him at trial demonstrated that

³⁸ *Id.* at 163.

³⁹ ROBERT S. WISTRICH, WHO'S WHO IN NAZI GERMANY 68 (2002).

⁴⁰ LESLIE ALAN HORVITZ & CHRISTOPHER CATHERWOOD, ENCYCLOPEDIA OF WAR CRIMES AND GENOCIDE 159 (2006).

⁴¹ WISTRICH, *supra* note 39, at 68.

⁴² HORVITZ & CATHERWOOD, *supra* note 40, at 159.

⁴³ HARDY, *supra* note 30, at 87.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ WISTRICH, *supra* note 39, at 68.

⁴⁷ See The Nurnberg Trial, Judgment, Fritzsche (Int'l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 186 (1946).

⁴⁸ HARDY, *supra* note 30, at 87.

such radio emissions espoused the general policies of the Nazi regime, which “arouse[d] in the German people those passions which led them to the commission of atrocities.”⁴⁹ The Tribunal did not find Fritzsche guilty, though, because it concluded his Jeremiads against the Jews did not directly urge their persecution and “[h]is position and official duties were not sufficiently important . . . to infer that he took part in originating or formulating propaganda campaigns.”⁵⁰

Nuremberg prosecutor Alexander Hardy later observed that evidence not available by the time of the earlier IMT proceeding certainly would have resulted in a guilty conviction for Fritzsche:

[His work as Chief of the German Press Division] was far more important than the task of venting his golden voice [Later found press directives] brought the lie to Fritzsche’s denials, during his trial before the IMT, of knowledge of such crimes as the extermination of the Jews and atrocities in concentration camps. He not only knew of them but played an important part in bringing them about.⁵¹

In fact, Fritzsche later faced justice before a German *Spruchkammer*, or Denazification Court, and was sentenced to eight years, the maximum punishment such courts could mete out.⁵²

3. Otto Dietrich

a. Background

Otto Dietrich was born in the western German city of Essen, also in the Ruhr, in 1897.⁵³ Described by one expert as “resolutely middle-class,” he attended a local grammar school before volunteering to serve in the German Army with the outbreak of World War I.⁵⁴ He was assigned to the western front and was ultimately awarded the Iron Cross, First Class.⁵⁵ He then studied at the Universities of Munich, Frankfurt am Main, and Freiburg, earning a doctorate in political science in 1921.⁵⁶ He began his career as a research assistant for the Essen Chamber of Commerce and then transitioned into the newspaper business. He started as a deputy editor of the Essen *Nationalzeitung*.⁵⁷ Then, in

⁴⁹ *The Nurnberg Trial*, 6 F.R.D at 186–87.

⁵⁰ *Id.*

⁵¹ HARDY, *supra* note 30, at 87.

⁵² *Id.* at 85.

⁵³ Roger Moorhouse, *Introduction to OTTO DIETRICH, THE HITLER I KNEW: MEMOIRS OF THE THIRD REICH’S PRESS CHIEF*, at ix (2010).

⁵⁴ *Id.*

⁵⁵ WISTRICH, *supra* note 39, at 39.

⁵⁶ *Id.*

⁵⁷ *Id.*

1928, he became business manager for the *Augsburger Zeitung*, a German-national evening paper.⁵⁸

He then married into a newspaper family. As the son-in-law of the influential owner of the *Rheinisch-Westfälische Zeitung*, he forged important links with Rhineland heavy industry and became himself an adviser of a big steel trust.⁵⁹ In 1929 he joined the Nazi Party and began working for Adolf Hitler as the Nazi leader's "Press Referent." He then used his industrial connections to introduce Hitler to Westphalian coal and iron magnates.⁶⁰ Owing to his vital role in Nazi fundraising efforts, he was able to forge a close relationship with Hitler.⁶¹

Dietrich also became an active publicist and prolific writer for the Nazi Party.⁶² Throughout the 1930s, he published a number of texts that "recalled the 'heroic' phase of the Party struggle, outlined Nazism's philosophical underpinning or contributed to the growing deification of Hitler."⁶³ These works included *Mit Hitler an die Macht (With Hitler on the Road to Power)* (1933), *Die philosophischen Grundlagen des Nationalsozialismus (The Philosophical Foundations of Nazism)* (1935), and *Der Führer und das deutsche Volk (The Führer and the German People)* (1936).⁶⁴

b. Dietrich and the Press

Roger Moorhouse notes that "for all his publications, Dietrich's main responsibility was as a controller of his fellow journalists."⁶⁵ In 1931, Hitler made Dietrich Director of the Nazi Party's Reich Press Office.⁶⁶ In that position, he further impressed the future Führer by closely managing all press details of Hitler's 1931 "aerial" election campaign, which involved flying 30,000 miles and addressing 10,000,000 Germans at 200 meetings.⁶⁷ On February 28, 1934, soon after becoming Reich Chancellor, Hitler named Dietrich the Nazi party "Reich Press Chief."⁶⁸ In his decree doing so, Hitler wrote: "He (Dietrich) directs in my name the guiding principles for the entire editorial work of the Party Press. In addition, as my Press Chief he is the highest authority for all press publications of the Party and all its agencies."⁶⁹

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ HARDY, *supra* note 30, at 50; Moorhouse, *supra* note 53, at ix.

⁶¹ HARDY, *supra* note 30, at 50.

⁶² Moorhouse, *supra* note 53, at ix.

⁶³ *Id.*

⁶⁴ *Id.* at ix n.1.

⁶⁵ *Id.* at ix-x.

⁶⁶ HARDY, *supra* note 30, at 50.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 50-51.

Dietrich's authority over the press soon extended beyond the party and into the government with his appointment as Reich Press Chief of the Government in November 1937. In that position, he exerted control over the policy and content of print media in the Third Reich. This included the German Press, Foreign Press, and Periodical Press in the umbrella "Press Division" of the Propaganda Ministry.⁷⁰

His control was exerted in two primary ways. First, he or one of his subordinates held daily "press conferences" with representatives of all German newspapers, orally giving them the "*Tagesparolen*" or daily press directives.⁷¹ The significance of the *Tagesparole* was described by the IMT in the Fritzsche trial: "[The *Tagesparole*], as these instructions were labeled, directed the press to present certain themes, such as the leadership principle, the Jewish problem, the problem of living space, or other standard Nazi ideas."⁷²

Second, Dietrich exercised control through the "Editorial Control Law," which he helped formulate.⁷³ The law obligated all newspaper and periodical editors to be members of the "Reich League of the German Press."⁷⁴ Dietrich, as Chairman of the Reich League, operated courts that disciplined and removed editors who did not tow Nazism's ideological line.⁷⁵

As one historian has noted:

Dietrich cooked the German news to Hitler's prescriptions [and ensured] complete regimentation of editors and journalists On 22 February 1942 Hitler expressed his admiration for Dietrich's resourcefulness in one of his rambling table talks: "Dr. Dietrich may be physically small, but he is exceptionally gifted at his job. . . . I am proud of the fact that with his handful of men I can at once throw the rudder of the press through 180 degrees—as happened on 22 June 1941 [the day Germany invaded Russia]. There is no other country which can copy us in that."⁷⁶

At the same time, Dietrich also served a special personal function for Hitler—his daily presentation of the so-called "Führer Material." This was a compilation of news material from domestic and foreign press news sources and

⁷⁰ *Id.* at 52.

⁷¹ *Id.* at 40–44.

⁷² The Nurnberg Trial, 6 F.R.D. 69, 186 (Int'l Mil. Trib. 1946). According to Alexander Hardy, Fritzsche was acquitted mainly because the evidence before the IMT contained only isolated copies of the *Tagesparolen*—"and none replete with criminal overtone such as those received as evidence in the Dietrich case." HARDY, *supra* note 30, at 41. Dietrich ordered all written copies of the *Tagesparolen* destroyed by the editors who received them. By the time of Dietrich's trial, prosecutors had found two editors who had not destroyed their copies. Those had not been discovered by the time of the IMT's judgment. *Id.* at 40–41.

⁷³ JEFFREY HERF, *THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST* 18 (2006).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ WISTRICH, *supra* note 39, at 40.

it "gave Dietrich added exposure to Hitler and gained him tremendous influence, as he virtually determined what he wanted Hitler to read. . . . Hitler's political decisions were influenced by the perusal of this material."⁷⁷

c. Dietrich in the Nazi Power Hierarchy

Consistent with this influence, Dietrich's growing stature in the party was marked by promotion in other branches of the Nazi power structure. In 1933, Hitler had selected Dietrich for membership in the exclusive "Party Cabinet Members," a group which included the highest strata of Nazi leaders such as Deputy Führer Rudolf Hess, Stürmabteilung (SA) Chief Ernst Röhm, Schutzstaffel (SS) Chief Heinrich Himmler, German Labor Front Leader Robert Ley, Minister of Food and Agriculture Walther Darré, Propaganda Minister Josef Goebbels, Governor General Hans Frank, and Foreign Policy Office Leader and Party Philosopher Alfred Rosenberg.⁷⁸

Dietrich also became a powerful leader within the SS. On December 24, 1932, shortly before Hitler's accession to the chancellorship, Dietrich joined the organization with the rank of SS Oberführer.⁷⁹ From there, he advanced rapidly, becoming an SS Brigadeführer a little over a year later, and within three weeks of that an SS Gruppenführer. He was attached to Heinrich Himmler's staff in April 1936 and by 1941 he had attained the rank of SS Obergruppenführer. Within this rank was an exclusive list of elite SS leaders at the top of which was Himmler himself, at No. 1. Dietrich was No. 21.⁸⁰

d. Dietrich and the Persecution of the Jews

In 1937, Dietrich was appointed to the position of State Secretary (for the German Press, Foreign Press and Periodicals Divisions) in the Propaganda Ministry, a post at which he remained until the end of the war.⁸¹ Although formally subordinate to Goebbels, Dietrich's close relationship with Hitler permitted him to go over Goebbels's head whenever he wanted. In the words of Nuremberg prosecutor Alexander Hardy: "Dietrich exploited [his various positions of power] and his constant intimacy with the Fuehrer to disseminate the principal doctrines of the Nazi conspirators."⁸²

Hardy goes on to specify Dietrich's significant role in the conditioning of the German people for persecution of the Jews:

It was Dietrich, the *Poisoned Pen*, who led the press propaganda phases of the program which incited hatred and conditioned public opinion for mass

⁷⁷ HARDY, *supra* note 30, at 65-66.

⁷⁸ *Id.* at 51.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

persecutions on political, racial, and religious grounds. Heretofore, Dietrich's role has been ignored by historians, but actually he, more than anyone else, was responsible for presenting to the German people the justification for liquidating the Jews. . . . Dietrich had at his disposal not only Streicher's paper, but more than 3,000 other publications in the newspaper field and 4,000 publications in the periodical field with a circulation of better than 30,000,000 to disseminate anti-Semitism in a vastly more comprehensive manner. And, he did just that!⁸³

e. *The Trial and Conviction of Otto Dietrich*

i. *Background*

A die-hard Nazi until the final days of the war, Dietrich finally fell afoul of Hitler only a month before the Führer's suicide.⁸⁴ On March 30, 1945, Hitler accused Dietrich of defeatism in a heated exchange over propaganda tactics.⁸⁵ Hitler then placed him on indefinite leave.⁸⁶ He eventually resurfaced in the post-war chaos and was arrested by the British.⁸⁷

Given the timing of his arrest and his being technically subordinate to Goebbels, Dietrich was not tried in the IMT proceeding of the major war criminals.⁸⁸ Rather, he was prosecuted by the Americans in their occupation zone as part of one in a series of twelve trials of lesser-ranking officials that followed the IMT.⁸⁹ The trials were conducted pursuant to Allied Control Council Law No. 10 (CCL No. 10) before the Nuremberg Military Tribunals (NMTs). Pursuant to Article II(a) of CCL No. 10, "Crimes against Humanity" are defined as "atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, *or persecutions on*

⁸³ HARDY, *supra* note 30, at 188–89.

⁸⁴ Moorhouse, *supra* note 53, at x.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Of course, Fritzsche, an IMT defendant, was also subordinate to Goebbels. But Fritzsche was put in the dock at the IMT at the insistence of the Soviet Union, which had in its custody significantly fewer IMT defendants than the other allies, especially the Americans. See *How Did Hans Fritzsche Avoid the Noose?*, PROPAGANDER FAQ, <http://grwa.tripod.com/050.html> (last visited Mar. 23, 2013). Fritzsche was one of only two high-ranking Nazis captured by the Soviets (the other being Raeder). *Id.* They felt Fritzsche's inclusion would help balance the inequality regarding IMT defendants vis-à-vis the other allies. *Id.* So his prosecution before the IMT, as opposed to a subsequent trial in the Russian zone, was motivated largely by incipient Cold War political considerations. *Id.*

⁸⁹ *Subsequent Nuremberg Proceedings, Case #11, The Ministries Case*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007082> (last updated June 10, 2013) [hereinafter HOLOCAUST ENCYCLOPEDIA].

political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”⁹⁰

Of these subsequent trials, Dietrich was a defendant in the so-called *Ministries Case*, also known as the *Wilhelmstrasse Case* or *United States v. Ernst von Weizaecker*.⁹¹ The eleventh of the twelve trials, the twenty-one defendants in the case were officials of various Reich ministries and other prominent government members, bankers, and armaments officials.⁹²

ii. *The Indictment*

The Ministries indictment was filed on November 18, 1947, and the defendants were arraigned two days later.⁹³ The indictment listed eight counts: *Count 1*—Crimes against Peace (styled “Planning, Preparation, Initiation, and Waging of Wars of Aggression and Invasions of Other Countries”); *Count 2*—Conspiracy to Commit Crimes against Peace (styled “Common Plan and Conspiracy”); *Count 3*—War Crimes (styled “War Crimes: Murder and Ill-Treatment of Belligerents and Prisoners of War”); *Count 4*—Crimes against Humanity (styled “Crimes against Humanity: Atrocities and Offenses Committed against German Nationals on Political, Racial and Religious Grounds from 1933 to 1939”); *Count 5*—War Crimes and Crimes against Humanity (styled “War Crimes and Crimes against Humanity: Atrocities and Offenses Committed against Civilian Population”); *Count 6*—War Crimes and Crimes against Humanity (styled “War Crimes and Crimes against Humanity: Plunder and Spoliation”); *Count 7*—War Crimes and Crimes against Humanity (styled “War Crimes and Crimes against Humanity: Slave Labor”); and *Count 8*—Membership in Criminal Organizations.⁹⁴

Not every defendant was indicted on every count of the indictment. Dietrich himself was indicted only with respect to Counts 1 (Crimes against Peace), 3 (War Crimes), 4 (Crimes against Humanity: Persecution of German Nationals),

⁹⁰ Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. III(c) (Dec. 20, 1945) (emphasis added), reprinted in TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 250 (1949) [hereinafter CCL No. 10].

⁹¹ *United States v. Ernst van Weizsaecker (Ministries Case)*, in XII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 350 (1951) [hereinafter TRIALS OF WAR CRIMINALS]. It is also known as the “Wilhelmstrasse Trial” because the German Foreign Office, where a number of the defendants worked, was located on the Wilhelmstrasse in Berlin. THE NUREMBERG TRIAL AND INTERNATIONAL LAW 268 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

⁹² HOLOCAUST ENCYCLOPEDIA, *supra* note 89.

⁹³ *Id.*

⁹⁴ *United States v. Ernst Weizsaecker (Ministries Case)*, in XII TRIALS OF WAR CRIMINALS, *supra* note 91, Indictment, at 13–63.

5 (Crimes against Humanity: Atrocities and Offenses Committed against Civilian Populations), and 8 (Membership in Criminal Organizations).⁹⁵

iii. *The Conviction*

At trial's end, Dietrich was convicted on only Counts 5 and 8.⁹⁶ Count 4, whose title in the indictment was "Crimes against Humanity: Atrocities and Offenses Committed against German Nationals on Political, Racial and Religious Grounds from 1933 to 1939," was dismissed by the Tribunal prior to the judgment (given its unique focus on pre-war conduct).⁹⁷ Count 4's title, in relation to the definition of "persecution" in CCL No. 10, Art. III(a), indicates explicitly that it charged the named defendants with persecution.⁹⁸

That is not true of Count 5, the charge on which Dietrich was convicted in relation to his media activity and hate speech. Styled "War Crimes and Crimes against Humanity: Atrocities and Offenses Committed against Civilian Population," Count 5 certainly encompasses different categories of criminal conduct.⁹⁹ But that conduct includes persecution based on speech activity. In particular, paragraph 38 of the indictment (the first paragraph under Count 5), states that the defendants committed "crimes against humanity, as defined by Article II of Control Council Law No. 10, in that they participated in atrocities and offenses, including . . . persecutions on political, racial, and religious grounds."¹⁰⁰ Paragraph 39 specifies that "[t]he defendants created, formulated and disseminated inflammatory teachings which incited the Germans to the active persecution of 'political and racial undesirables.'"¹⁰¹ Paragraph 46 centers this specifically on Dietrich's hate speech, noting that, in relation to the program to exterminate the Jews, Dietrich and the other specified defendants "presented to the German people" "the rationale and justification for, and the impetus to, mass slaughter."¹⁰² Paragraph 48 goes on to declare that, in execution of this program "the defendant Dietrich conditioned public opinion to accept this program."¹⁰³

⁹⁵ KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 457 (2011). Dietrich's conviction on Count 8 meant the Tribunal found him to be a member of the SS and Leadership Corps of the Nazi party. *Id.* at 290–91. The conviction on that count did not implicate Dietrich's hate speech or media conduct. *Id.*

⁹⁶ *Id.* at 457.

⁹⁷ *Id.*

⁹⁸ *Id.* at 473–74.

⁹⁹ *United States v. Ernst Weizsaecker (Ministries Case)*, in *XII TRIALS OF WAR CRIMINALS*, *supra* note 91, Indictment, at 43.

¹⁰⁰ *Id.* at 43–44.

¹⁰¹ *Id.* at 44. The paragraph concludes: "In speeches, articles, news releases, and other publications, it was constantly reiterated that those groups were germs, pests, and subhumans who must be destroyed." *Id.*

¹⁰² *Id.* at 47.

¹⁰³ *Id.* at 48.

The prosecution's opening statement makes the point explicitly:

The war crimes and crimes against humanity charged in the indictment fall into three broad categories. First, there are war crimes committed in the actual course of hostilities or against members of the armed forces of countries at war with Germany. These are set forth in count three of the indictment. Second, there are crimes committed, chiefly against civilians, in the course of and as part of the German occupation of countries overrun by the Wehrmacht. These include various crimes set forth in count five of the indictment, the charges of plunder and spoliation in count six, and the charges pertaining to slave labor in count seven. Many of the crimes in this second category constitute, at one and the same time, war crimes as defined in paragraph 1(b) and crimes against humanity as defined in paragraph 1(c) of Article II of Law No. 10. *Third, there are crimes committed against civilian populations in the course of persecution on political, racial, and religious grounds. Such crimes, when committed prior to the actual initiation of Germany's invasions and aggressive wars, are set forth in count four of the indictment; when committed thereafter, they are charged in count five.* The crimes described in count four accordingly, are charged only as crimes against humanity; those charged in count five, for the most part, constitute at one and the same time war crimes and crimes against humanity.¹⁰⁴

In its closing statement concerning Dietrich, with respect to persecution, the prosecution stressed that Dietrich's criminal responsibility arose from his conditioning the German people to embrace persecution of the Jews. Noting that, like Streicher, Dietrich "infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution," the prosecution pointed out that Dietrich's influence was even further-reaching.¹⁰⁵ Streicher's paper, *Der Stürmer*, at its peak, boasted a circulation of only 600,000.¹⁰⁶ But, the prosecution stressed, "Dietrich had at his disposal not only Streicher's paper, but more than 3,000 other publications with a circulation of better than 3,000,000."¹⁰⁷ The prosecution went on: "The evidence shows the character and intensity of the anti-Semitic directives released by the defendant Dietrich during the period to which the IMT referred in passing judgment on Streicher."¹⁰⁸ The prosecution then concluded that Dietrich "directed the press to present to the people certain themes, such as the leadership principle, the Jewish problem, the problem of living space, or other standard Nazi ideas which served as a condition precedent in tempering the masses of German people to each aggression."¹⁰⁹

¹⁰⁴ *Id.* at 167–68 (emphasis added).

¹⁰⁵ United States v. Ernst Weizsaecker (*Ministries Case*), in XIV TRIALS OF WAR CRIMINALS, *supra* note 91, at 39–40.

¹⁰⁶ *Id.* at 40.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

iv. *A Finding of Persecution in the Judgment*

Most significantly, in its judgment, the NMT found Dietrich guilty on Count 5 based on his conditioning of the German people for the Final Solution:

It is thus clear that a well thought-out, oft-repeated, persistent campaign to *arouse the hatred* of the German people against Jews was fostered and directed by the press department and its press chief, Dietrich. That part or much of this may have been inspired by Goebbels is undoubtedly true, but Dietrich approved and authorized every release. . . .

The only reason for this campaign was to blunt the sensibilities of the people regarding the campaign of persecution and murder which was being carried out.

. . . .

These press and periodical directives were not mere political polemics, they were not aimless expressions of anti-Semitism, and they were not designed only to unite the German people in the war effort.

Their clear and expressed purpose was to enrage the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.

By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews.¹¹⁰

Although the Tribunal does not use the word “persecution” in the last sentence, it is clear that Dietrich’s crimes against humanity conviction is based on persecution. Most significantly, the Tribunal referred to “persecution” in the sentence immediately preceding it (i.e., the purpose of Dietrich’s press directives was to “subdue any doubts” regarding measures of “racial persecution” against the Jews).¹¹¹ Similarly, two paragraphs previously, the Tribunal opined that the only reason for Dietrich’s campaign was to blunt the sensibilities of the people regarding the campaign of persecution.¹¹² Consistent with this, as revealed by the prosecution’s opening statement, Count 5 of the indictment clearly includes persecution within its ambit.¹¹³ And in its closing statement, in analogizing Dietrich with Streicher, the prosecution quoted that part of the IMT judgment against Streicher that referred to Streicher’s “infecting the German mind with the virus of anti-Semitism” and thereby inciting the German people to “active persecution.”¹¹⁴ Streicher, as demonstrated

¹¹⁰ *Id.* at 575–76.

¹¹¹ *United States v. Ernst Weizsaecker (Ministries Case)*, in XIV TRIALS OF WAR CRIMINALS, *supra* note 91, at 576.

¹¹² *Id.*

¹¹³ *See supra* notes 93–94 and accompanying text.

¹¹⁴ *See supra* note 104 and accompanying text.

previously, was convicted of persecution as a crime against humanity based on his hate speech.¹¹⁵

The final sentence also stands out for what it says about the basis for the persecution conviction. It was not specific calls or incitements to engage in particular action. Rather, to quote the judges, it was a “furnishing” of “excuses and justifications” to “subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.”¹¹⁶

III. HATE SPEECH AND PERSECUTION IN THE MODERN CASES AND COMMENTARY

A. *Hate Speech and Persecution in the Rwandan Genocide Cases*

1. *Georges Ruggiu*

Over fifty years after the judgment at Nuremberg against Otto Dietrich, the International Criminal Tribunal for Rwanda charged Belgian national Georges Ruggiu with persecution as a crime against humanity for his incendiary radio broadcasts during the Rwandan Genocide.¹¹⁷ Ruggiu was an announcer for Radio Télévision des Mille Collines (RTLM), an extremist Hutu radio outlet that urged the Rwandan majority group to slaughter Tutsis.¹¹⁸ Ruggiu pled guilty to one count of crimes against humanity (persecution) in connection with his RTLM broadcasts. In sentencing him, the Tribunal summarized the elements that comprise the crime against humanity of persecution as follows: (1) “those elements required for all crimes against humanity under the Statute”—i.e., certain acts (such as persecution) when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack; (2) “a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5”; and (3) “discriminatory grounds.”¹¹⁹

With respect to the *mens rea* required for the crime, the Tribunal held:

The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. . . . Part of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct. Therefore an accused should be aware of this greater dimension in order to be culpable thereof.

¹¹⁵ See *supra* notes 35–38 and accompanying text.

¹¹⁶ *United States v. Ernst Weizsaecker (Ministries Case)*, in XIV TRIALS OF WAR CRIMINALS, *supra* note 91, at 475–76.

¹¹⁷ Gordon, *supra* note 15, at 320–21.

¹¹⁸ *Id.*

¹¹⁹ *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 21 (June 1, 2000) (citing *Prosecutor v. Kupreskic*, Case No. IT-95-16, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000)).

Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.¹²⁰

The Tribunal then found that Ruggiu's broadcast satisfied these elements:

[W]hen examining the [admitted] acts of persecution . . . it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group . . . on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.¹²¹

Significantly, the Tribunal noted the *Streicher* judgment was particularly relevant since Ruggiu, like Streicher, "infected peoples' [sic] minds with ethnic hatred and persecution."¹²²

2. The ICTR Media Case

The ICTR then analyzed crimes against humanity (persecution) in the speech context as part of the famous *Media Case* judgment concerning media executives Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze.¹²³ Nahimana and Barayagwiza were founders of RTLM and Ngeze was founder and editor-in-chief of the extremist Hutu newspaper *Kangura*.¹²⁴ All three defendants were convicted of crimes against humanity (persecution) charges.¹²⁵

In finding the defendants guilty of these charges, the trial chamber reaffirmed that hate speech targeting a population on discriminatory group identity grounds constitutes the crime against humanity of persecution:

Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their

¹²⁰ *Id.* ¶ 20 (citing Prosecutor v. Kayishema, Case No. ICTR 95-1-T, Judgment (May 21, 1999)).

¹²¹ *Id.* ¶ 22.

¹²² *Id.* ¶ 19.

¹²³ Gordon, *supra* note 15, at 323.

¹²⁴ *Id.*

¹²⁵ *Id.* at 324–25.

ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.¹²⁶

The Tribunal pointed out that persecution is not a provocation to cause harm—it is the harm itself:

Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. The Chamber notes that Julius Streicher was convicted by the International Military Tribunal at Nuremberg of persecution as a crime against humanity for anti-semitic writings that significantly predated the extermination of Jews in the 1940s. Yet they were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people. In Rwanda, the virulent writings of *Kangura* and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed.¹²⁷

3. *The Mugesera Case*

Another Rwandan genocide case implicating hate speech as a crime against humanity was adjudicated by the Supreme Court of Canada. In November 1992, not long before the Rwandan Genocide, Léon Mugesera delivered a venomous anti-Tutsi speech to Hutu extremist supporters in Kabaya, Gisenyi province.¹²⁸ In the speech, Mugesera dehumanized the Tutsis, referring to them as cockroaches and snakes that should be expelled from Rwanda.¹²⁹ Based on the speech, Rwandan authorities indicted Mugesera, who fled to Canada and became the object of a Canadian deportation case.¹³⁰ Mugesera appealed adverse rulings all the way up to the Canadian Supreme Court, which confronted the issue of whether Mugesera was liable for persecution as a crime against humanity and was therefore, pursuant to immigration law, ineligible to enter Canada.¹³¹

As part of its opinion, the Court specifically grappled with the issue of whether “a speech that incites hatred, which as we have seen Mr. Mugesera’s speech did, [can] meet the initial criminal act requirement for persecution as a crime against humanity.”¹³² The Canadian Supreme Court then decided that it could. It started its analysis by examining the link between Mugesera’s toxic

¹²⁶ *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1072 (Dec. 3, 2003), <http://www.refworld.org/pdfid/404468bc2.pdf>.

¹²⁷ *Id.* ¶ 1073.

¹²⁸ *Mugesera v. Canada*, [2005] 2 S.C.R. 100, ¶¶ 4–6 (Can.).

¹²⁹ See Gordon, *supra* note 15, at 331–32.

¹³⁰ *Id.*

¹³¹ *Id.* at 332.

¹³² *Mugesera*, 2 S.C.R. 100, ¶ 137.

oratory and the widespread and systematic attack against the civilian population:

[The] attack must be directed against a relatively large group of people, mostly civilians, who share distinctive features which identify them as targets of the attack. A link must be demonstrated between the act and the attack. In essence, the act must further the attack or clearly fit the pattern of the attack, but it need not comprise an essential or officially sanctioned part of it. A persecutory speech which encourages hatred and violence against a targeted group furthers an attack against that group. In this case, in view of the [lower court's] findings, [Mugesera's] speech was a part of a systematic attack that was occurring in Rwanda at the time and was directed against Tutsi and moderate Hutu¹³³

In light of these considerations, the Court determined that “the harm in hate speech lies not only in the injury to the self-dignity of target group members but also in the credence that may be given to the speech, which may promote discrimination and even violence.”¹³⁴ As a result, the Court concluded that Mugesera’s speech constituted persecution as a crime against humanity.¹³⁵

B. Hate Speech and Persecution at the ICTY

In its only case to deal with hate speech and persecution as a crime against humanity, the ICTY has taken a different approach. In *Prosecutor v. Kordic & Cerkez*, an ICTY trial chamber found, without exception, that hate speech not calling for action, and on its own, could not be the basis for a crime against humanity (persecution) charge.¹³⁶ The indictment in that case alleged that defendant Dario Kordic, along with other persons, carried out an ethnic cleansing campaign by, inter alia, “encouraging, instigating and promoting hatred, distrust, and strife on political, racial, ethnic or religious grounds, by propaganda, speeches and otherwise.”¹³⁷

In its decision, the trial chamber found that the speech at issue could not amount to persecution. It held that “criminal prosecution of speech acts falling short of incitement finds scant support in international case law.”¹³⁸ To back that statement, it cited *Streicher* and observed that “the International Military Tribunal convicted the accused of persecution because he ‘incited the German

¹³³ *Id.* at 10 (Case Synopsis—“Crimes against Humanity”).

¹³⁴ *Id.* ¶ 147. But the Court also emphasized that “hate speech always denies fundamental rights. The equality and the life, liberty and security of the person of target-group members cannot but be affected.” *Id.*

¹³⁵ *Id.* ¶ 148.

¹³⁶ *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

¹³⁷ *Id.* ¶ 37.

¹³⁸ *Id.* at 59 n.272 (emphasis added).

people to active persecution” which amounted to “*incitement* to murder and extermination.”¹³⁹

C. *The Media Case Appeals Chamber Decision*

In the meantime, the *Media Case* trial judgment had been appealed.¹⁴⁰ By this time, the parties could look to a burgeoning body of jurisprudence regarding the issue of hate speech and persecution. And the defendants relied on the ICTY trial chamber’s judgment in *Kordic* to argue that mere hate speech could not be the basis of a crimes against humanity (persecution) conviction.¹⁴¹ This argument was bolstered by an amicus curiae brief from the Open Society Institute (OSI), an American nongovernmental organization (NGO). In contending that the defendant’s persecution convictions should be overturned, the brief emphasized that Streicher’s persecution conviction was entirely grounded in his “prompting ‘to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions.’”¹⁴² OSI further supported this argument by referencing the IMT’s acquittal of Hans Fritzsche “on grounds that his hate speeches did not seek ‘to incite the Germans to commit atrocities against the conquered people.’”¹⁴³

In upholding the convictions, the appeals chamber ruled that hate speech, in the context of other acts constituting a persecutory campaign against a victim population, could be the basis for a crimes against humanity (persecution) conviction.¹⁴⁴ But it refused to decide whether hate speech, on its own and not directly calling for violence, could be the predicate for a charge of persecution as a crime against humanity: “The Appeals Chamber is of the view that it is not necessary to decide here whether, in themselves, mere hate speeches not inciting violence against the members of the group are of a level of gravity equivalent to that for other crimes against humanity.”¹⁴⁵

Individual judges submitted partly dissenting opinions that tackled the issue of persecution. Of these, the partial dissent of American Judge Theodor Meron rejected the majority approach as *too* permissive regarding hate speech as the basis for a persecution conviction.¹⁴⁶ According to Judge Meron, in every case,

¹³⁹ *Id.* As will be discussed in greater depth *infra*, the *Kordic* chamber omitted, inter alia, the following language in *Streicher*: “In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active *persecution*.” The Nurnberg Trial, Streicher Judgment, 6 F.R.D. 69, 162 (Int’l Mil. Trib. 1946) (emphasis added).

¹⁴⁰ *Nahimana v. Prosecutor*, Case No. ICTR 99-52-A, Judgment (Nov. 28, 2007).

¹⁴¹ *Id.* ¶ 972.

¹⁴² *Id.* ¶ 979.

¹⁴³ *Id.* The brief also criticized the *Media Case* trial chamber for failing to follow the *Kordic* judgment, which had found that mere hate speech could not constitute persecution. *Id.*

¹⁴⁴ *Id.* ¶¶ 985–86.

¹⁴⁵ *Id.* ¶ 987.

¹⁴⁶ *Nahimana*, Case No. ICTR-99-52-A, ¶ 13 (Meron, J., partially dissenting).

“mere hate speech may not be the basis of a criminal conviction.”¹⁴⁷ Instead, echoing the arguments of the Open Society Institute amicus brief citing *Streicher*, hate speech should constitute a criminal offense, he opined, only when it “rises to the level of inciting violence or other imminent lawless action.”¹⁴⁸

Also of note was the partially dissenting opinion of Judge Mohamed Shahabuddeen, who took the opposite position of Judge Meron—he thought the majority decision’s approach to hate speech and persecution was too limited.¹⁴⁹ In other words, he believed (in accord with Judge Fausto Pocar’s partially dissenting opinion) that the Tribunal should have held that hate speech can per se constitute an underlying act of persecution.¹⁵⁰ In so holding, Judge Shahabuddeen explained that his position was not contradicted by the IMT’s *Fritzsche* judgment. *Fritzsche*’s acquittal, according to Judge Shahabuddeen, owed to the fact that “he did not take part ‘in originating or formulating propaganda campaigns.’”¹⁵¹ In addition, even though the IMT happened to observe that *Fritzsche* did not evidently aim “to incite the German people to commit atrocities on conquered people,” this does not evidence an intention to make advocacy to genocide or extermination an essential element “to the success of a charge for persecution (by making public statements) as a crime against humanity.”¹⁵²

D. Scholarly and Expert Commentary

Scholarly and expert commentary regarding the issue of hate speech and persecution has similarly split into camps that, respectively, favor limiting the crime to speech explicitly advocating violence and those believing that noxious rhetoric uttered as part of a widespread or systematic attack against a civilian population should qualify. And perceptions of the IMT propaganda precedents factor into that split. For example, Professor Diane Orentlicher, in her article *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, calls for limiting the scope of crimes against humanity (persecution) in relation to speech.¹⁵³ In doing so, she relies explicitly on *Streicher* and *Fritzsche*:

Yet, it is difficult to see how the *Streicher* verdict could support a conclusion to the effect that “communications that constitute persecution” need not include a call to action, let alone a call to violence. Although the IMT did not clearly enunciate the elements of persecution as a crime against humanity, its conviction of *Streicher* and acquittal of *Fritzsche* strongly suggest that the

¹⁴⁷ *Id.* ¶¶ 12–13.

¹⁴⁸ *Id.* ¶ 12.

¹⁴⁹ *See id.* ¶ 7 (Shahabuddeen, J., partially dissenting).

¹⁵⁰ *See id.* ¶¶ 7–9.

¹⁵¹ *Id.* ¶ 10.

¹⁵² *Nahimana*, Case No. ICTR-99-52-A, ¶¶ 10–11.

¹⁵³ *See Orentlicher, supra* note 7, at 18–19.

Tribunal was prepared to judge a defendant guilty of persecution as a crime against humanity based upon his expressive activity only when he intentionally urged listeners to commit atrocities.¹⁵⁴

Orentlicher even goes on to criticize the *Media Case* trial judgment for “incorrectly impl[ying] that the IMT convicted Streicher for speech that did not call for extermination of Jews.”¹⁵⁵

Similarly, First Amendment expert Kevin Goering has criticized the *Media Case* judgment’s treatment of hate speech and persecution for “[a]llowing discriminatory advocacy” in cases when “there was no call to arms.”¹⁵⁶ Goering’s conclusion rests in part on an assumption that the Streicher persecution holding was based on “inciting speech.”¹⁵⁷

In contrast, experts such as Fausto Pocar, based on his partial dissent in the *Media Case* appeals judgment and his article *Persecution as a Crime Under International Criminal Law*,¹⁵⁸ as well as this author,¹⁵⁹ believe that the ICTR’s interpretation of *Streicher* can be supported—i.e., that the defendant was convicted of CAH-persecution: (1) “for anti-[S]emitic writings that significantly predated the extermination of Jews in the 1940s”;¹⁶⁰ and (2) based, at least in substantial part, on Streicher’s injecting a poison “into the minds of the Germans which caused them to follow the National Socialists’ policy of Jewish

¹⁵⁴ *Id.* at 38–39.

¹⁵⁵ *Id.* at 39–40; see also Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT’L L. REV. 557 (2006) (reprising the same arguments).

¹⁵⁶ Kevin W. Goering et al., *Why U.S. Law Should Have Been Considered in the Rwanda Media Convictions*, 22 COMM. LAW., Spring 2004, at 10, 10–12 (“However, the charges for persecution would be considered attacking mere advocacy, and would not have been sustained in the United States.”).

¹⁵⁷ *Id.* at 10. This would appear to be based on a flawed understanding of the term “incitement.” Elsewhere in the article, Goering states that:

[A]lthough the judgment against Streicher did not “explicitly note a direct causal link” between his publication and “specific acts of murder,” the judgment did find the publication “was a poison injected into the minds of Germans which caused them to follow the National Socialists’ policy of Jewish persecution and extermination,” and this sustained a conviction of incitement.

Id. In fact, Streicher was convicted of persecution as a crime against humanity, not incitement. Moreover, if Streicher’s speech was a “poison injected into the minds of Germans” which conditioned them for accepting the Final Solution, that would not amount to “incitement” in the non-legal sense either because the speech was not directly calling for action. *Id.* at 10.

¹⁵⁸ Fausto Pocar, *Persecution as a Crime Under International Criminal Law*, 2 J. NAT’L SECURITY L. & POL’Y 355, 359 (2008).

¹⁵⁹ See Gordon, *supra* note 15, at 356–58.

¹⁶⁰ Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgement and Sentence, ¶ 1073 (Dec. 3, 2003), <http://www.refworld.org/pdfid/404468bc2.pdf>.

persecution.”¹⁶¹ Similarly, with regard to *Fritzsche*, “language in the *Fritzsche* judgment also permits the inference that speech not calling for violence could constitute persecution.”¹⁶²

IV. THE SIGNIFICANCE OF THE *DIETRICH* CASE GOING FORWARD

A. The Importance of Criminalizing Hate Speech Not Explicitly Calling for Violence for Persecution Offenses

Hate speech and mass atrocity have consistently gone hand in hand¹⁶³—empirically, the latter has not been possible without the former.¹⁶⁴ This is certainly true for crimes against humanity.¹⁶⁵ Zealous free speech advocates are opposed to criminalizing hate speech not explicitly calling for violence as persecution because they believe it will stifle legitimate, if repugnant, expression.¹⁶⁶

However, in accord with the modern jurisprudence, speech may be prosecuted as a crime against humanity (persecution) only if uttered as part of a widespread or systematic attack against a civilian population (with the defendant having knowledge of his speech being part of the attack).¹⁶⁷ Such speech, used specifically in service of the attack, is not the sort of expression the First Amendment seeks to protect.¹⁶⁸ First of all, if such an attack is taking place, the marketplace-of-ideas rationale no longer applies as the government sponsoring the attack has likely shut down the marketplace.¹⁶⁹ Thus, such speech does not promote collective democracy or individual self-actualization.¹⁷⁰ It is merely meant to spur or justify violence.

¹⁶¹ Goering et al., *supra* note 156, at 10.

¹⁶² Gordon, *supra* note 15, at 358.

¹⁶³ See David Livingstone Smith, *Dehumanization, Genocide, and the Psychology of Indifference*, PSYCHOL. TODAY (Dec. 2, 2011), <http://www.psychologytoday.com/blog/philosophy-dispatches/201112/dehumanization-genocide-and-the-psychology-indifference-0> (“There is no disputing the fact that dehumanization and atrocity often go hand in hand.”).

¹⁶⁴ See Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1171 n.148 (2013) (providing a list of historical examples of this phenomenon including the Turkish atrocities against Armenians, Nazi slaughter of the Jews, mass murder in Rwanda and Darfur, and the 2007–2008 post-election violence in Kenya).

¹⁶⁵ *Id.*

¹⁶⁶ See Gordon, *supra* note 15, at 348–50 (discussing the concerns of the staunchest defenders of free expression).

¹⁶⁷ *Id.* at 347–48 (referring to the chapeau of Article 7 of the Rome Statute of the International Criminal Court, which also requires that the broader attack be pursuant to or in furtherance of a state or organizational policy involving the multiple commission of enumerated crimes against humanity acts).

¹⁶⁸ *Id.* at 349.

¹⁶⁹ *Id.* at 348–49.

¹⁷⁰ *Id.*

If the crimes against humanity (persecution) incitement versus no-incitement gridlock promoted by the ambiguities of *Streicher* and *Frtizsche* is allowed to persist, then certain significant criminal speech may go unpunished. *Dietrich's* persecution holding with respect to hate speech not directly calling for violence has the potential to break the gridlock and allow for punishment of what is truly criminal speech.

B. *Moving Beyond the Strict Confines of Incitement to Genocide*

Moreover, even were such speech prosecuted as incitement to genocide, it could still go unpunished. Unfortunately, the mens rea for incitement is directly linked to that of genocide. It consists of a dual intent: (1) to provoke another to commit genocide; and (2) to commit the underlying genocide itself.¹⁷¹ And the intent necessary to prove genocide consists of a desire to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.¹⁷²

But proving genocidal intent is notoriously difficult, with its heightened intent requirement (known as "*dolus specialis*") and its singular focus on destruction. As William Schabas notes: "The specific intent necessary for a conviction of genocide is even more demanding than that required for murder. The crime must be committed with intent to destroy, in whole or in part, a protected group [of people], as such."¹⁷³ Similarly, Stuart Ford observes that "genocide is exceptionally difficult to prove because of the specific intent requirement and genocide convictions are relatively rare."¹⁷⁴

On the other hand, as noted previously, the mens rea for crimes against humanity is the defendant's *knowledge* that his acts are part of a widespread or systematic attack against a civilian population. When compared to proving the mens rea for genocide, the burden of proving the same for crimes against humanity is much lower. Criminal law expert Wayne LaFave explains that "specific intent" involves the actor consciously desiring "to cause some definite result."¹⁷⁵ He goes on to explain that specific intent is the highest degree of mens rea and that "knowledge" is lower in the mens rea hierarchy.¹⁷⁶ One court has written:

"[K]nowledge" as contrasted with "intention" signif[ies] a state of mental realisation with the bare state of conscious awareness of certain facts in which

¹⁷¹ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 544 (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

¹⁷² *Id.* ¶ 731.

¹⁷³ WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 265 (2d ed. 2009).

¹⁷⁴ Stuart Ford, *Is the Failure To Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility To Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis*, 38 DENV. J. INT'L L. & POL'Y 227, 275 (2010).

¹⁷⁵ See WAYNE R. LAFAVE, HANDBOOK ON CRIMINAL LAW § 3.5(e) (3d ed. 2000).

¹⁷⁶ See *id.* § 3.4(a).

[the] human mind remains [simple] or inactive. On the other hand, “intention” is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one’s conduct so as to bring about a certain event.¹⁷⁷

Of course, in addition to the awareness of the existence of a widespread or systematic attack on the civilian population (as required for all crimes against humanity), persecution also requires discriminatory intent.¹⁷⁸ Thus, “the mens rea element of the crime of persecution is higher than the one required for ordinary crimes against humanity, although lower than the one required for genocide.”¹⁷⁹ Thus, with respect to the mental element alone, crimes against humanity (persecution) charges carry an easier burden for conviction than incitement to genocide charges.

Once again, though, it is not clear that speech-related charges for persecution minus evidence of explicit calls for violence would be viable if supported merely by the IMT precedents, in particular *Streicher*. As Professor Orentlicher points out:

Why does this matter? For present purposes the key point is that if *Streicher* had been convicted of pre-war conduct, Nuremberg could more readily be interpreted as precedent for convicting a defendant of persecution as a crime against humanity by virtue of speech that does not include a call to violence but that nonetheless helps condition a society to engage in persecution.¹⁸⁰

Of course, Professor Orentlicher’s argument assumes that, with respect to persecution cases, “Nuremberg” is limited to the *Streicher* and *Fritzsche* judgments. And therein, once more, lies the significance of the *Dietrich* decision. While *Streicher* and *Fritzsche* alone may leave ambiguity regarding the required scope of hate speech vis-à-vis a persecution charge (even after the ICTR *Media Case* appeals judgment), *Dietrich* does not. It clearly stands for the proposition that, on its own, speech short of explicit calls for violence may be the basis for charging crimes against humanity (persecution).

This is especially crucial as the International Criminal Court has yet to interpret persecution as a crime against humanity. Article 7 of the Rome Statute reads, in relevant part, as follows:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [a list of

¹⁷⁷ Prakash v. State, (1991) 1 S.C.R. 2012, 212 (India).

¹⁷⁸ David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 STAN. J. INT’L L. 221, 243 (2007).

¹⁷⁹ Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC*, 23 PENN ST. INT’L L. REV. 857, 876 (2005).

¹⁸⁰ Orentlicher, *supra* note 7, at 41.

enumerated acts follows—murder, extermination, enslavement, deportation, imprisonment, torture, rape/sexual slavery]. . . .

. . . .

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.¹⁸¹

This formulation is largely consistent with the formulations of crimes against humanity (persecution) in the respective statutes of the ICTR and ICTY. Thus, the ICC will very likely be in a position to choose between the positions taken by one or the other ad hoc tribunal with respect to the scope of persecution in reference to non-direct advocacy hate speech. *Dietrich* may very well tilt the balance in favor of a finding that hate speech not explicitly calling for violence may be charged as crimes against humanity (persecution).

And, to vary Professor Orentlicher's question somewhat, why does that matter in reference to specific cases at issue today? A review of current hate speech cases with atrocity implications is instructive in this regard.

C. *Specific Cases*

1. *The Case of Myanmar and the Muslims*

In Myanmar (formerly Burma), as the country transitions from a long military dictatorship to a semblance of civilian rule, the Muslim minority has been subject to religiously motivated violence by organized bands of Buddhist attackers. According to Human Rights Watch, in June 2012, dozens of Rohingya Muslims were killed and approximately 100,000 displaced after an attack by Arakan Buddhists.¹⁸² Human Rights Watch reported that “[t]he hostilities were fanned by anti-Muslim media accounts and local propaganda.”¹⁸³ It also detailed collusion between Arakan Buddhists and local government security forces. Two days later, in related follow-on attacks, government forces directly participated in the violence:

At this point, a wave of concerted violence by various state security forces against Rohingya communities began. For example, Rohingya in Narzi quarter—the largest Muslim area in Sittwe, home to 10,000 Muslims—described how Arakan mobs burned down their homes on June 12 while the

¹⁸¹ Rome Statute of the International Criminal Court, art. 7(1)(a–h), *opened for signature* July 17, 1998, 2178 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

¹⁸² HUMAN RIGHTS WATCH, “THE GOVERNMENT COULD HAVE STOPPED THIS”: SECTARIAN VIOLENCE AND ENSUING ABUSES IN BURMA’S ARAKAN STATE 1 (2012), *available at* http://www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf.

¹⁸³ *Id.*

police and paramilitary Lon Their forces opened fire on them with live ammunition.¹⁸⁴

More recently, in a flare-up of violence at the end of March 2013 in the central part of the country, Buddhist mobs murdered forty Muslims and displaced thousands more. Shortly thereafter, an op-ed in the *New York Times* titled *Kristallnacht in Myanmar*, reported that the country's Islam Council "has issued a statement saying the violence had been premeditated."¹⁸⁵ The op-ed went on to suggest that the Burmese government has been supporting the violence.¹⁸⁶ At about the same time, the UN special rapporteur on Myanmar human rights, Tomas Ojea Quintana, issued a statement saying, "I have received reports of State involvement in some of the acts of violence."¹⁸⁷

In an early April 2013 speech, former U.S. President Jimmy Carter expressed "'deep concern' over the recent inter-communal violence between Buddhists and Muslims, and the use of 'hate speech' by some leaders."¹⁸⁸ The BBC News featured a sample of some of that hate speech, much of which allegedly emanates from a prominent Buddhist monk.¹⁸⁹ The monk is quoted as accusing "Muslim men of repeatedly raping Buddhist women, of using their wealth to lure Buddhist women into marriage, then imprisoning them [at] home."¹⁹⁰

This type of speech does not represent direct calls for action. And yet it was seemingly sponsored or sanctioned by the government and was uttered in service of a widespread or systematic attack against a civilian population (and patently motivated by religious animus). With support of the *Dietrich* precedent, validating the ICTR jurisprudence, such hate speech should be chargeable as crimes against humanity (persecution).

2. The Case of Iran and the Israelis

Much of the spotlight on Iran's hate speech relates to statements issued by former President Mahmoud Ahmadinejad directly calling for Israel's

¹⁸⁴ *Id.* at 1–2.

¹⁸⁵ Swe Win, *Kristallnacht in Myanmar*, N.Y. TIMES LATITUDE BLOG (Mar. 29, 2013, 10:23 AM), <http://latitude.blogs.nytimes.com/2013/03/29/violence-against-muslims-in-meiktila-myanmar/?ref=myanmar>.

¹⁸⁶ *Id.*

¹⁸⁷ UN: *Reports Show Myanmar Govt. Involved in Violence Against Rohingya Muslims*, STATELESS ROHINGYA (Mar. 29, 2013), <http://www.thestateless.com/2013/03/un-reports-show-myanmar-govt-involved.html>.

¹⁸⁸ Paul Vrieze, *Jimmy Carter "Deeply Concerned" by Sectarian Violence and "Hate Speech,"* IRRAWADDY (Apr. 6, 2013), <http://www.irrawaddy.org/us/jimmy-carter-deeply-concerned-by-sectarian-violence-and-hate-speech.html>.

¹⁸⁹ Jonathan Head, *What Is Behind Burma's Wave of Religious Violence?*, BBC NEWS (Apr. 4, 2013, 5:41 PM), <http://www.bbc.co.uk/news/world-asia-22023830>.

¹⁹⁰ *Id.*

destruction. He infamously called for Israel to be “wiped off the map.”¹⁹¹ And he has less directly called for Israel’s destruction in other instances, stating on one occasion that the country is “heading toward annihilation.”¹⁹² On another occasion, he declared that Israelis “should know they are nearing the last days of their lives.”¹⁹³ And on yet still another, he announced that “Israel is destined for destruction and will soon disappear.”¹⁹⁴ However, Ahmadinejad was not eligible to run for re-election in 2013, given that he had already served two terms.¹⁹⁵ In June of last year, Iranians elected Hassan Rouhani president, a cleric and self-professed moderate¹⁹⁶ with “a long record as a regime insider with a record that is scarcely liberal.”¹⁹⁷ And yet, even with Ahmadinejad out of office, and a comparative moderate in his place, one cannot dismiss the threat posed by noxious Iranian rhetoric. As Michael Gerson wrote last year: “It is easy to dismiss this rhetoric as being designed for domestic consumption. . . . But the problem is this: Ahmadinejad’s language is not exceptional within the Iranian regime.”¹⁹⁸

In particular, the country’s supreme leader, Ayatollah Ali Khamenei, as well as other senior Iranian leaders, have also recently spewed hate speech directed at the people of Israel. Gerson continues:

Iran’s supreme leader, Ayatollah Ali Khamenei, also has referred to Israel as a “cancerous tumor.” . . . Senior Iranian military leaders, presidential advisers and religious authorities can be quoted endlessly in a similar vein. Zionists are “microbes” and “bacteria” and a “cancerous growth.” “Jews are very filthy people,” who are responsible for spreading disease and drug abuse.¹⁹⁹

This dehumanizing hate speech does not amount to direct calls for violence against the Israeli people.²⁰⁰ However, in connection with Hamas’s Iranian-

¹⁹¹ See Nazila Fathi, *Iran’s President Says Israel Must Be “Wiped Off the Map,”* N.Y. TIMES, Oct. 26, 2005, at A8.

¹⁹² See Michael Gerson, *Iran’s Incitement to Genocide*, WASH. POST, Apr. 4, 2013, http://www.washingtonpost.com/opinions/michael-gerson-irans-hate-speech-is-an-incitement-to-genocide/2013/04/04/2686e7a8-9ca1-11e2-9a79-eb5280c81c63_story.html.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Ladane Nasser, *Velayati May Run for Iran President as Calm to Ahmadinejad Storm*, BLOOMBERG (Mar. 26, 2013), <http://www.bloomberg.com/news/2013-03-26/velayati-may-run-for-iran-president-as-calm-to-ahmadinejad-storm.html>.

¹⁹⁶ Thomas Erdbrink, *Next Iran Leader Pledges Freedoms*, N.Y. TIMES, June 30, 2013, at A18.

¹⁹⁷ Joshua Muravchik, *Iran’s Hassan Rouhani Stands Out as a “Moderate” Among Reactionaries*, FORBES (June 20, 2013, 8:00 AM), <http://www.forbes.com/sites/realspin/2013/06/20/irans-hassan-rouhani-stands-out-as-a-moderate-among-reactionaries/>.

¹⁹⁸ Gerson, *supra* note 192.

¹⁹⁹ *Id.*

²⁰⁰ Nevertheless, those are also arguably implicated. Gerson points to Khamenei’s statement that “[t]he perpetual subject of Iran’ . . . ‘is the elimination of Israel from the region.’” *Id.* Gerson provides another seemingly direct call from Khamenei: “There is only

sponsored rocket launches at Israeli civilians from Gaza, such speech is arguably uttered as part of a widespread or systematic attack against Israeli civilians. In November 2012, Hamas fired over a thousand of these rockets into Israeli “neighborhoods, striking schools and homes” and killing innocent Israeli civilians.²⁰¹ On April 3, 2013, Hamas fired more rockets into southern Israel, the third time it had done so since a November cease-fire.²⁰² Significantly, these attacks were sponsored and financed by Iran.²⁰³ After the November cease-fire, Hamas leader Ismail Haniyeh thanked Iran for providing Hamas with “arms and money” for the attack.²⁰⁴

To the extent Hamas can be considered a proxy for Iran in the rocket attacks against Israeli civilians, the Iranian leaders’ hate speech, even though not calling directly for violence, might be prosecutable as crimes against humanity (persecution).²⁰⁵ Once again, the *Dietrich* decision would exponentially strengthen the doctrinal underpinnings of any such prosecution.²⁰⁶

3. Other Cases

a. Kenya

A myriad of other potential persecution cases could be affected by including consideration of the *Dietrich* precedent. Kenya is a prominent example. In the country’s 2007–2008 post-election violence, for example, hate speech predominated on the air waves and through other media.²⁰⁷ One expert has noted that “Kenyan hate radio programs helped instigate violence between the Kikuyu and Luo peoples.”²⁰⁸ Much of this discourse did not, it would

one solution to the Middle East problem, namely the annihilation and destruction of the Jewish state.” *Id.* In early 2013, Khamenei promised that, if the Iranian nuclear program is attacked, he would “level down Tel Aviv and Haifa.” *Id.* Other senior Iranian officials have stated, according to Gerson, that there is a religious duty to “fight the Jews and vanquish them so that the conditions for the advent of the Hidden Imam will be met.” *Id.*

²⁰¹ Michele Chabin, *Israeli–Hamas Cease-Fire May Be in Jeopardy*, USA TODAY, Apr. 4, 2013, <http://www.usatoday.com/story/news/world/2013/04/03/israel-gaza-strikes/2048805/>.

²⁰² *See id.*

²⁰³ *See Hamas Acknowledges Iran’s Support*, GLOBAL RES. NEWS (Nov. 24, 2012), <http://www.globalresearch.ca/hamas-acknowledges-irans-support/5312719>.

²⁰⁴ *Id.*

²⁰⁵ *See Gordon, supra* note 6, at 907–08 (suggesting that terrorist attacks against Israel sponsored and financed by Iran could, in the context of Ahmadinejad’s hate speech against Israel, qualify as a widespread or systematic attack against a civilian population for purposes of charging Ahmadinejad with crimes against humanity (persecution)).

²⁰⁶ Of course, the Iranian leaders might also be liable for the crime of direct and public incitement to commit genocide. *See id.* at 857 (evaluating prospects for charging direct and public incitement to commit genocide).

²⁰⁷ *See Kenya: Spreading the Word of Hate*, IRIN NEWS (Jan. 22, 2008), <http://www.irinnews.org/report/76346/kenya-spreading-the-word-of-hate>.

²⁰⁸ Tsesis, *supra* note 164, at 1172 n.148.

appear, involve direct calls for violence. In particular, following the December 30 declared presidential election win of incumbent candidate Mwai Kibaki, supporters of his opponent, Raila Odinga, declared fraud and began disseminating rancorous invective against Kibaki's backers.²⁰⁹ This hate speech had an ethnic component as Kibaki, as well as most of his advocates, were of the Kikuyu tribe. Odinga's backers were largely Luo and Kalenjin.²¹⁰ Much of this vituperation, originating from FM radio stations, did not, it would appear, involve direct calls for violence.²¹¹ As the Kenyan Commission of Inquiry into Post-Election Violence found: "Witnesses made specific reference to KASS FM. They claimed KASS FM in conjunction with politicians used derogatory language against Kikuyus, mouthed hate speech, and routinely called for their eviction, thereby helping to build up tensions that eventually exploded in violence."²¹²

Kalenjin radio announcer Joshua arap Sang, who broadcast for KASS FM, has been indicted by the ICC in connection with his broadcasts dehumanizing political opponents.²¹³ He has been accused of "whipping up ethnic hatred on the airwaves" that led to mass violence, including "the burning of a church near Eldoret where [ethnic Kikuyus] were sheltering."²¹⁴ Arap Sang has been charged with crimes against humanity but not persecution based on the hate speech.²¹⁵ Perhaps if the prosecutor had taken the *Dietrich* precedent into account, arap Sang might have been charged with persecution.

b. Côte d'Ivoire

In Côte d'Ivoire, in the spring of 2011, while President Laurent Gbagbo insisted on maintaining power despite losing the presidency in a November 2010 election, radio broadcasters supporting him exploited the airwaves to demonize the supporters of Gbagbo's victorious opponent, Alassane Ouattara.²¹⁶ Partly owing to such hate speech, Gbagbo loyalists attacked pro-

²⁰⁹ *Kenya's 2013 Election: Will History Repeat Itself?*, THINK AFR. PRESS (Nov. 8, 2012, 4:53 PM), <http://thinkafricapress.com/kenya/projections-upcoming-2013-elections>.

²¹⁰ *Id.*

²¹¹ KENYA COMM'N OF INQUIRY INTO POST-ELECTION VIOLENCE, FINAL REPORT 301-02 (2008), available at http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf.

²¹² *Id.* at 298-99.

²¹³ See Gregory S. Gordon, *Setting the Record Straight on International Speech Crime Law*, JURIST (May 24, 2011), <http://www.jurist.org/forum/2011/05/gregory-gordon-arap-sang.php>.

²¹⁴ *At a Glance: Kenya Poll Violence Suspects*, BBC NEWS (Sept. 6, 2013, 4:52 PM), <http://www.bbc.co.uk/news/world-africa-12001281>.

²¹⁵ Gordon, *supra* note 213.

²¹⁶ See *Ivory Coast in Speech-Fueled Catastrophe*, VOICES THAT POISON (Apr. 2, 2011), <http://voicesthatpoison.wordpress.com/2011/04/02/ivory-coast-in-speech-fueled-catastrophe/>.

Ouattara civilians.²¹⁷ None of these supporters, or Gbagbo himself, has been charged with persecution as a crime against humanity specifically in connection with hate speech.²¹⁸ This may very well be attributable to prosecutors' ignoring the obvious implications of the *Dietrich* judgment.

c. Sudan

In addition to the ongoing genocide in Darfur,²¹⁹ the government of Sudan has also recently inflicted violence against the same victim group in a different region—Christians and black African Muslims on its border with South Sudan.²²⁰ After decades of civil war, and owing to border disputes related to the recent division of the two countries pursuant to the Comprehensive Peace Agreement, Sudan has subjected citizens on the frontier with South Sudan to aerial attacks resulting in the death of thousands of innocent civilians in the South Kordofan and Blue Nile States.²²¹ The violence has been especially egregious in South Kordofan's Nuba Mountain region, where hundreds of thousands of Nuba indigenous people have been displaced or murdered by Sudanese military personnel.²²² This violence has been fueled and accompanied by hate speech coming from the highest levels of the Sudanese government. Last year, in an address to his supporters, Sudanese president Omar al-Bashir referred to southerners as "insects" and a "disease."²²³

Such speech, although not explicitly calling for violence, is arguably part of a campaign targeting the Nuba Mountains/Blue Nile regions "to establish an

²¹⁷ *Id.*

²¹⁸ See, e.g., Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11, Warrant of Arrest, ¶ 3 (Nov. 23, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1276751.pdf> (significantly, the arrest warrant does not specifically indicate that hate speech is a specific ground for the persecution charge against Gbagbo).

²¹⁹ See Nicholas D. Kristof, *A Policy of Rape Continues*, N.Y. TIMES, July 25, 2013, at A27 ("The Sudanese government, which tends to calibrate its brutality to the degree of attention it receives, is taking advantage of the lack of scrutiny by stepping up its decade-long campaign in Darfur of mass murder, burned villages and sexual violence.").

²²⁰ See *Sudan's South Kordofan: "Huge Suffering from Bombs,"* BBC NEWS (June 14, 2011, 11:12 PM), <http://www.bbc.co.uk/news/world-africa-13767146>; see also SAMUEL TOTTEN, GENOCIDE BY ATTRITION: THE NUBA MOUNTAINS OF SUDAN 119 (2012).

²²¹ TOTTEN, *supra* note 220, at 103–04.

²²² *Id.* at 103.

²²³ Imran Khan, *Bashir Calls South Sudan Leaders "Insects,"* SUDAN TRIB. (Apr. 19, 2012), <http://www.sudantribune.com/spip.php?mot422>; *Sudan President Seeks To "Liberate" South Sudan*, BBC NEWS (Apr. 18, 2012, 8:03 PM), <http://www.bbc.co.uk/news/world-africa-17761949>. Bashir's comments were nominally directed at "South Sudan" and South Kordofan and Blue Nile are technically in Sudan, not South Sudan. See JOHAN BROSCHÉ & DANIEL ROTHBART, VIOLENT CONFLICT AND PEACEBUILDING: THE CONTINUING CRISIS IN DARFUR 101 (2013) (noting that the South Kordofan and Blue Nile States are officially part of Sudan). But both states are on the border of South Sudan, and are populated by numerous pro-South Sudan communities, especially in the Nuba Mountains, many of which fought with southern rebels during the 1983–2005 north–south civil war. *Id.*

Arab Islamic hegemony by eradicating both the Sudanese Christians and the indigenous black, African Muslims.”²²⁴ Although Bashir and other members of his regime are under indictment for atrocities committed in Darfur, the regime’s murderous conduct on the southern border has thus far been immune from law enforcement measures.²²⁵ Certainly, the dehumanizing speech that helps justify and fuel al-Bashir’s murder campaign in South Kordofan and the Blue Nile has completely eluded judicial scrutiny.

In Darfur itself, as in South Kordofan and the Blue Nile, atrocities have been “fueled by hate speech”—with the government using it to dehumanize blacks and spur the Janjaweed’s ethnic violence against them.²²⁶ As one expert has noted:

The violence is not restricted to Darfur, where between two and four hundred thousand people have already been murdered. It has spread to Abyei, the Blue Nile State, the Nuba mountains, and possibly elsewhere. It’s clear from the rhetoric of the Janjaweed militias that dehumanization lubricates the machinery of slaughter in Sudan.

“Dog, son of dogs, we came to kill you and your kids.”

“Kill the black donkeys! Kill the black dogs! Kill the black monkeys!”

“You blacks are not human. We can do anything we want to you.”

“We kill our cows when they have black calves. We will kill you too.”

“You make this area dirty; we are here to clean the area.”

“You blacks are like monkeys. You are not human.”²²⁷

Unfortunately, despite the central role such speech has played in the atrocities committed against innocent civilian victims in Darfur, none of the Sudanese defendants indicted by the International Criminal Court has been charged with crimes against humanity (persecution) to date.²²⁸ A healthy

²²⁴ Faith J.H. McDonnell, *Sudan & Obama’s Legacy of Death*, FRONTPAGE MAG. (Aug. 15, 2013, 12:12 AM), <http://frontpagemag.com/2013/faith-j-h-mcdonnell/sudan-obamas-legacy-of-death/>.

²²⁵ See, e.g., *Omar Hassan Ahmad al-Bashir*, HAGUE JUST. PORTAL, <http://www.haguejusticeportal.net/index.php?id=9502> (last visited Mar. 12, 2014) (noting the Security Council’s referral of the situation in Darfur by Resolution 1593 and its indictment of al-Bashir and current Sudanese minister Ahmad Muhammad Harun (“Ali Kushayb”).

²²⁶ Tesis, *supra* note 164.

²²⁷ Smith, *supra* note 163.

²²⁸ See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx (last visited Feb. 26, 2014) (indicating that Bashir has been charged with five counts of crimes against humanity—but not persecution—two counts of war crimes, and three counts of genocide); *Prosecutor v. Abdel Raheem Muhammad Hussein*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050112/Pages/icc02050112.aspx (last visited Feb. 26, 2014) (showing that Hussein has been charged with seven counts of crimes against humanity, including persecution, and six counts of war crimes). Although Hussein, the current Minister of National Defense, former Minister of the

appreciation for *Dietrich* would help raise judicial awareness and perhaps contribute to prosecutorial initiative with respect to charging persecution against these defendants in relation to their use of hate speech.

V. CONCLUSION

At the end of June 2013, four Shia Muslims were lynched by a mob outside of Cairo after months of virulent anti-Shia hate speech, “which the Muslim Brotherhood [Egypt’s ruling party at the time], condoned and at times participated in.”²²⁹ The speech denigrated the victims but did not directly implore the majority group to commit violence against them.²³⁰ According to Human Rights Watch, “from the outset three vans of riot police who had been dispatched were stationed nearby but . . . they failed to intervene to disperse the

Interior, and former Sudanese President’s Special Representative in Darfur, has been charged with crimes against humanity (persecution), his arrest warrant does not specifically indicate that hate speech is a basis for the persecution charge. See *Prosecutor v. Abdel Raheem Muhammad Hussein*, Case No. ICC-02/05-01/12, Warrant of Arrest (Mar. 1, 2012), http://www.worldcourts.com/icc/eng/decisions/2012.03.01_Prosecutor_v_Hussein2.pdf#search=“hussein”; see also *Prosecutor v. Ahmad Harun and Ali Kushayb*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/Pages/darfur_%20sudan.aspx (last visited Feb. 26, 2014) (demonstrating that Harun and Kushayb have been charged with various counts of war crimes and crimes against humanity, including persecution). Once again, the arrest warrants for Harun and Kushayb do not specifically indicate that hate speech is a specific ground for the persecution charge. See *Prosecutor v. Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279860.pdf>; *Prosecutor v. Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279813.pdf>. It should be noted that the charges against Harun include liability pursuant to Article 25(3)(b), which ascribes criminal responsibility for a person who “[o]rders, solicits or induces the commission of . . . a crime which in fact occurs or is attempted.” Rome Statute, *supra* note 181, art. 25(3)(b). While this is speech related, it is different from crimes against humanity (persecution). Article 25(3)(b) of the Rome Statute implicates speech that results in the commission of other enumerated crimes under the Rome Statute. See *id.* In the case of persecution as a crime against humanity, the speech itself is the crime, regardless of any subsequent action taken pursuant to or in consideration of the speech. *Id.*; see also Gordon, *supra* note 15, at 324 (noting that hate speech as persecution “is not a provocation to cause harm. It is itself the harm.”).

²²⁹ *Egypt: Lynching of Shia Follows Months of Hate Speech*, HUM. RTS. WATCH (June 27, 2013), <http://www.hrw.org/news/2013/06/27/egypt-lynching-shia-follows-months-hate-speech>. In June 2012, the Muslim Brotherhood came to power in Egypt with the election of its leader, Mohamed Morsi, as President. See *Muslim Brotherhood-Backed Candidate Morsi Wins Egyptian Presidential Election*, FOX NEWS (June 24, 2012), <http://www.foxnews.com/world/2012/06/24/egypt-braces-for-announcement-president/>. Morsi and the Muslim Brotherhood were removed from power by the Egyptian military in July 2013. See David D. Kirkpatrick & Mayy El Sheikh, *An Egypt Arrest, and a Brotherhood on the Run*, N.Y. TIMES, Aug. 20, 2013, at A1 (describing arrests of key Brotherhood leaders and arrogation of power by the Egyptian military).

²³⁰ HUM. RTS. WATCH, *supra* note 229.

mob.”²³¹ These lynchings appear to have been part of a broader campaign by the Muslim Brotherhood to inflict violence on religious minorities—one source reports that the Brotherhood has also “engaged in a full-scale campaign of terror against Egypt’s Christian minority.”²³² If the crimes of the Muslim Brotherhood were to be prosecuted by an international tribunal, either through self—or Security Council—referral to the ICC²³³ or through establishment of an ad hoc tribunal, would the purveyors of the hate speech connected to the murder of the Shia Muslims be charged with crimes against humanity (persecution)?

Assuming the charges were based on the speech itself and the chapeau were satisfied, given the split in jurisprudence between the ICTR and ICTY, the answer is not clear. And reference to the IMT’s decisions on hate speech at Nuremberg—*Streicher* and *Fritzsche*—fails to clarify matters either. Jurists and scholars have traditionally cited to those opinions but they are altogether too sparse and equivocal. However, as this Article has demonstrated, the subsequent decision of the NMT with respect to Reich Press Chief Otto Dietrich has the effect of cutting through this doctrinal morass. The tribunal found Dietrich guilty of crimes against humanity (persecution) for his steady stream of media invective against the Jewish people that helped lay the groundwork for the Holocaust. Dietrich’s toxic rhetoric did not directly urge Germans to commit acts of violence against Jews. But liability for the crime of persecution attached nonetheless.

So why have jurists and scholars largely ignored it in the decades since? Perhaps it is because the decision never explicitly found Dietrich guilty of persecution for his speech activities. It only alluded to liability for crimes against humanity and Dietrich was convicted of Count 5 of the *Ministries* indictment, whose title lumps together war crimes and crimes against humanity—without mentioning persecution or associated language. Perhaps this reticence to cite *Dietrich* as a persecution case is compounded by the fact that Count 4 of the same indictment did specifically refer to the operative language of persecution but that count was dismissed prior to trial.

This Article, however, has demonstrated through reference to the subsequent specific language of the indictment, as well as to the prosecution’s

²³¹ *Id.*

²³² Kirsten Powers, *The Muslim Brotherhood’s War on Coptic Christians*, DAILY BEAST (Aug. 22, 2013), <http://www.thedailybeast.com/articles/2013/08/22/the-muslim-brotherhood-s-war-on-coptic-christians.html>.

²³³ Egypt is not a state party to the International Criminal Court. See *The State Parties to the Rome Statute*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Aug. 27, 2013). Even though Egypt is not a party to the Rome Statute, the new government may, on an ad hoc basis, refer to the ICC alleged crimes of the Muslim Brotherhood. See Rome Statute, *supra* note 181, art. 12(3) (“If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”). Alternatively, the Security Council could refer the case to the ICC. See *id.* art. 13(b).

arguments and to the totality of the NMT's decision, that Dietrich was indeed convicted of persecution in connection with his hate-media activities. And that revelation should not be ignored. As multitudes of innocent people are being set up for murder through broadcast and publication of incendiary discourse, it is time to dust off this valuable precedent and employ it to uphold essential human rights protections. Hate speech not explicitly calling for action but in service of a widespread or systematic attack against a civilian population should be criminalized. The would-be targets of such hate are entitled to the law's protection; its actual victims and their families are entitled to justice. The judgment against Otto Dietrich may go a long way toward finally assuring them of attaining those goals.

